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November 26, 2019

Paul M. Gallagher, Town Clerk
Town of Kingston
26 Evergreen Street
Kingston, MA 02364

Re: Kingston Annual Town Meeting of May 4, 2019 -- Case # 9480
Warrant Articles # 42-1, 43 and 44 (Zoning)
Warrant Articles # 15, 33, 34, 35, 38, 41 and 42-2 (General)

Dear Mr. Gallagher:

Articles 42-1, 42-2, 43 and 44 - We approve Articles 42-1, 42-2, 43 and 44, from the May 4, 2019 Kingston Annual Town Meeting.¹

Article 41 - We disapprove and delete in its entirety Article 41 from the May 4, 2019, Kingston Annual Town Meeting.² Our decision is largely based on a recent Land Court decision in a matter arising under similar facts, Valley Green Grow, Inc. v. Town of Charlton, Land Court No. 18-MISC-000483 (March 7, 2019) (VGG). As the Land Court concluded, a town may not adopt a general by-law to restrict a use that the town has historically regulated by zoning by-law. In our decision below, we summarize the by-law adopted under Article 41 and previous Town regulation of marijuana-related uses, the Attorney General's standard of review, and applicable judicial decisions and then explain the basis for our disapproval.

I. Summary of Article 41

Under Article 41 (a citizen's petition), the Town voted to amend its general by-laws, Article 7, to prohibit within the town all "marijuana establishments" as follows:

Consistent with G.L. c. 94G §3 (a)(2), "marijuana establishments" as defined in G.L. c. 94G § 1, as may be amended from time to time, shall be prohibited within the Town of Kingston.

¹ In a decision issued August 29, 2019, we approved Articles 15, 33, 34, 35 and 38 and extended our deadline for review of Articles 41, 42, 43 and 44 for 60-days until November 1, 2019. On October 31, 2019, we extended our deadline for review of Articles 41, 42, 43 and 44 for an additional 30-days until December 1, 2019.

² We have previously disapproved a similar by-law adopted by the Town of Brewster. See the Attorney General's decision, issued April 1, 2019 in Case # 9273, disapproving a general by-law prohibiting marijuana establishments where the Town had already regulated such establishments through its zoning by-laws.

Town Meeting approved Article 41 (amending the general by-laws to prohibit marijuana establishments) by a vote of 242 in favor to 133 opposed, which represents a majority of approximately 64.5% of those voting on Article 41.

II. History of the Town's Regulation of Marijuana-Related Uses

a. Medical Marijuana Dispensaries

Passage of Question 3 ("Medical Use of Marijuana") at the 2012 biennial statewide election amended state law to eliminate criminal and civil penalties for medical use of marijuana by qualifying patients. One provision of the amended state law permitted the operation of medical marijuana treatment centers (later called registered marijuana dispensaries) within the Commonwealth. At its 2014 Annual Town Meeting, the Town voted under Article 41 to amend its zoning by-law, Section 4.8, "Commercial District," to add a new Sub-section 4.8.3.7 ("Medical Marijuana Treatment Centers"), allowing such dispensaries to operate within the Town pursuant to a special permit granted by the Planning Board. In accordance with G.L. c. 40, § 32, the Attorney General approved Article 41 on September 2, 2014 (Case # 7249).

b. Commercial Marijuana Businesses

At the November 2016 biennial statewide election, voters approved Question 4 ("Legalization, Regulation and Taxation of Marijuana"). The new law permitted, among other things, the operation of a variety of types of marijuana establishments within municipalities and included provisions under which cities and towns could regulate those establishments. Kingston has amended its zoning by-laws, as described below, to regulate marijuana establishments within the Town.

1. June 28 Special Town Meeting - Case # 9113

At the June 26, 2018, Special Town Meeting, under Article 5, the Town amended its zoning by-laws pertaining to marijuana establishments. Specifically, under Article 5, the Town amended Section 4.0, "Use Regulations" to add a new Section 4.21, "Marijuana Establishments," to allow marijuana establishments by special permit, in certain districts. In addition, under Article 5, the Town made related amendments to the Town's, "Table of Use Regulations." The new Section 4.21 was a comprehensive by-law, that established, among other regulations, definitions [Section 4.21.2]; general requirements pertaining to the required special permit [Section 4.21.3]; the location where marijuana uses were allowed, as well as required setback distances [Section 4.21.4]; the special permit application process and required documents [Section 4.21.5]; and the special permit decision criteria [Section 4.21.6]. The Attorney General approved Article 5 on September 28, 2018 (Case # 9113).

2. May 2019 Annual Town Meeting - Case # 9480

At the May 4, 2019, Annual Town Meeting, under Articles 42, 43 and 44, the Town amended its zoning by-laws pertaining to the regulation of marijuana. Specifically, Article 42 amended several sections of the zoning by-laws, Section 4.21 pertaining to locations and setbacks. Article 43 amended the zoning by-law, subsection 4.21.4, "Location" to add to the

setback requirements “public parks.” And Article 44 amended the zoning by-law, subsection 4.21.4, “Location,” to require a 100-foot distance between a marijuana establishment and any residential lot in the Town.³ The Attorney General approves Articles 42, 43 and 44 in this decision (Case # 9480).

Against this backdrop of the Town’s history of regulating marijuana uses, we now explain our disapproval of Article 41.

III. The Attorney General’s Standard of Review

Pursuant to G.L. c. 40, § 32, the Attorney General has a “limited power of disapproval,” and “[i]t is fundamental that every presumption is to be made in favor of the validity of municipal by-laws.” Amherst v. Attorney General, 398 Mass. 793, 795-96 (1986). The Attorney General does not review the policy arguments for or against the enactment. Id. at 798-99 (“Neither we nor the Attorney General may comment on the wisdom of the town’s by-law.”) Rather, in order to disapprove a by-law (or any portion thereof), the Attorney General must cite an inconsistency between the by-law and the state Constitution or laws. Id. at 796. “As a general proposition the cases dealing with the repugnancy or inconsistency of local regulations with State statutes have given considerable latitude to municipalities, requiring a sharp conflict between the local and State provisions before the local regulation has been held invalid.” Bloom v. Worcester, 363 Mass. 136, 154 (1973). “The legislative intent to preclude local action must be clear.” Id. at 155. Massachusetts has the “strongest type of home rule and municipal action is presumed to be valid.” Connors v. City of Boston, 430 Mass. 31, 35 (1999) (internal quotations and citations omitted). Notwithstanding this deferential standard of review, we disapprove the general by-law adopted under Article 41 for the reasons discussed below.

IV. The Town May Not Amend its Earlier Zoning Regulation of Commercial Marijuana Establishments Through the General By-Law Adopted Under Article 41.⁴

- a. A general by-law has no force and effect to rescind a use permitted under zoning regulations.

Chapter 94G permits towns to regulate commercial marijuana businesses through by-laws, provided those by-laws are not “unreasonably impracticable” or in conflict with that chapter. *See* G.L. c. 94G, § 3(a). Nothing in the text of Chapter 94G requires that such local regulation be effectuated through zoning—as opposed to general—by-laws. Nonetheless, a general by-law may not be effective to change earlier zoning by-law provisions governing a particular subject matter where, as here, the procedural requirements of Chapter 40A, the state

³ We note that Article 40, seeking to delete Section 4.21, “Marijuana Establishments,” from the Town’s zoning by-laws, appears to have failed at Town Meeting. We also note that under Article 45, the Town voted to accept the provisions of G.L. c. 64N, § 3, to impose a 3% sales tax on the sale or transfer of marijuana or marijuana products by a marijuana retailer operating within the Town of Kingston. Article 45 is not a by-law amendment, and it therefore does not require the approval of the Attorney General pursuant to G.L. c. 40, § 32.

⁴ In connection with our review, we received communications urging our approval of Article 41. We appreciate this input, which has aided us in our review.

Zoning Act, have not been observed. *See Rayco Investment Corp. v. Board of Selectmen of Raynham*, 368 Mass. 385, 394 (1975) (concluding that by-law limiting trailer-park operator licenses was insufficient to amend town's previous zoning by-law regulating such parks where record did not demonstrate that license limitation had been enacted in accordance with the procedural requirements of Chapter 40A). Depending on the town's history of regulation, its comprehensive zoning treatment of a particular subject matter may not be susceptible to subsequent change by way of a general by-law. *See id.* at 393; *Spenlinhauer v. Town of Barnstable*, 80 Mass App. Ct. 134, 139-140 (2011) (town's comprehensive regulation of off-street parking by zoning by-laws could not be amended through enactment of a general by-law).

In determining whether a subsequent general by-law effectively changes earlier zoning by-law enactments governing the same subject matter, the courts have considered whether the subsequent enactment has the "nature and effect" of a zoning by-law. *See Rayco*, 368 Mass. at 392. Zoning by-laws regulate, among other things, "the character of the community and the compatibility of nearby land uses." *See Lovequist v. Conservation Comm'n of Dennis*, 379 Mass. 7, 13-14 (1979); *see also Spenlinhauer*, 80 Mass App. Ct. at 141 ("character and quality of the town's neighborhoods" was the focus of discussion leading to enactment of off-street parking regulations that were, in effect, zoning regulations). A local regulation governing individual applications to engage in a particular activity may properly be adopted through a general by-law, while a regulation generally applicable to all land within particular zoning districts is more appropriately enacted through the procedures set forth in Chapter 40A. *See Spenlinhauer*, 80 Mass. App. Ct. at 142 (contrasting *Lovequist* wetlands protection by-law applicable through individual applications with off-street parking regulations applicable to all properties within a zoning district).

As judicially observed, "the distinction between zoning and [general by-laws] is not an empty formality, for valid zoning measures can be implemented only by following the procedures set forth in G.L. c. 40A." *Spenlinhauer*, 80 Mass. App. Ct. at 137. These procedural protections include a report by the local planning board after a duly noticed public hearing (or the expiration of 21 days from the date of the hearing). G.L. c. 40A, § 5. Moreover, changes in zoning by-laws protect some prior existing uses, while general by-laws typically do not. *Spenlinhauer*, 80 Mass. App. Ct. at 137-138. As a practical matter, local zoning by-laws require a two-thirds majority vote of Town Meeting to approve, *see* G.L. c. 40A, § 5, ¶ 5, while general by-laws can be adopted by a simple majority vote. Though the line between matters that may be regulated through general by-laws and those that must be regulated by zoning is not always clear, *id.* at 138, the facts preceding the adoption of Article 41 demonstrate its unsuitability as a general by-law to change previous Town zoning enactments governing marijuana-related businesses.

- b. As a general by-law intended to rescind a use permitted under zoning regulations, Article 41 is invalid.

As discussed above, the Town has regulated medical and commercial marijuana uses primarily through zoning since 2014. This history is an important factor in evaluating the validity of the general by-law adopted under Article 41. *See Rayco*, 368 Mass. at 393 (town's prior history of regulating trailer parks through zoning was "significant"); *Spenlinhauer*, 80 Mass. App. Ct. at 139-140 (noting town's prior history of regulating off-street parking through zoning). In considering a challenge to a town's general by-law prohibiting all commercial

marijuana uses, the Land Court (Foster, J.) recently concluded that the town’s history of using zoning to regulate such uses made the rule of Rayco and Spenlinhauer applicable. See Memorandum and Order Allowing Plaintiffs’ Motion for Summary Judgment, Valley Green Grow, Inc. v. Town of Charlton, Land Court No. 18-MISC-000483 (March 7, 2019) (“VGG”), at 19 (declaring invalid a general by-law prohibiting all commercial marijuana uses enacted by special town meeting several months after town had enacted zoning to govern these uses at its annual town meeting).⁵ Under this rule, a town may supplement a comprehensive zoning scheme through the adoption of a general by-law but may not use a general by-law to “contradict or restrict the use that is controlled by the zoning bylaw.” Id. at 18. For example, a town could enact a general by-law requiring local licensing of a use permitted under the zoning by-law but may not use a general by-law to rescind the zoning by-law. Id.

The procedural requirements applicable to zoning by-laws were as central to the determination of the Land Court in VGG, as they had been to the Spenlinhauer Court. See VGG, at 18; Spenlinhauer, 80 Mass. App. Ct. at 137-138. The operation of these requirements is as stark in VGG as it is here. Two proposed by-laws were before the Charlton Special Town Meeting. The first was a proposed zoning by-law amendment that would have rescinded the comprehensive zoning by-law previously adopted to regulate commercial marijuana uses within the town: this measure garnered a majority vote but not the two-thirds vote necessary to amend a zoning by-law. See VGG, at 20. The second article voted by the Charlton Special Town Meeting was the general by-law under review by the Land Court, which passed by a majority vote. Id. In the view of the Land Court, the Charlton “town meeting evaded the strict two-thirds vote requirement of G.L. c. 40A, § 5, for amending a zoning bylaw by enacting a general bylaw instead.” Id. So too here. The Kingston May 4, 2019 Annual Town Meeting adopted the general by-law proposed under Article 41 by a majority of approximately 64.5%, short of the two-thirds vote requirement necessary to amend the Town’s previously adopted zoning by-law.⁶

We are constrained to disapprove and delete the general by-law adopted under Article 41 by its similarity—in content and history—to the Charlton general by-law so recently invalidated by the Land Court, applying the principles of Rayco and Spenlinhauer. There, as here, the general by-law did not represent an effort to supplement regulation of the uses already governed by the zoning by-laws, but rather an effort to annul the previous zoning enactment without observing the procedural protections of Chapter 40A. See Rayco, 368 Mass. at 394 (zoning by-laws may not be amended outside mechanisms prescribed by Chapter 40A). This is not to say that general by-laws may never be enacted to regulate in an area previously the subject of zoning regulation, but such general by-laws must supplement, and not annul, those previous enactments. See VGG, at 18. Where a town has chosen to enact comprehensive zoning by-laws governing a particular use within its borders, amendment to that regulation must occur within the zoning framework. Id. at 19. The Town’s fulsome regulation of commercial marijuana businesses through its zoning by-law, Section 4.21, “Marijuana Establishments,” is the type of “history” of

⁵ On September 13, 2018, we approved Charlton’s general by-law prohibiting all commercial marijuana uses in the town, but we cautioned that the by-law could be subject to a successful challenge on the basis of the Rayco and Spenlinhauer decisions. See Case # 9116.

⁶ We also note that Article 40, seeking to delete from the Town’s zoning by-laws, Section 4.21, “Marijuana Establishments,” (the Town’s previously adopted zoning by-law), appears to have failed at Town Meeting.

regulating marijuana use contemplated by Rayco and Spenlinhauer.⁷ See VGG, at 19. Against this backdrop, a general by-law may not be used to prohibit a use previously permitted under the zoning by-law.

V. Conclusion

For these reasons, we **disapprove** and delete in its entirety the proposed general by-law adopted under Article 41.

Note: Pursuant to G.L. c. 40, § 32, neither general nor zoning by-laws take effect unless the Town has first satisfied the posting/publishing requirements of that statute. Once this statutory duty is fulfilled, (1) general by-laws and amendments take effect on the date these posting and publishing requirements are satisfied unless a later effective date is prescribed in the by-law, and (2) zoning by-laws and amendments are deemed to have taken effect from the date they were approved by the Town Meeting, unless a later effective date is prescribed in the by-law.

Very truly yours,

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⁷ In addition, the adoption by the Town of general by-law amendments (specifically, Article 7, “Marijuana”) supplements its comprehensive zoning scheme by establishing as part of the general by-laws, a limitation on the number of marijuana retail establishments, hours and fine provisions.